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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 718

GROVE PRESS, INC., a New York corporation, *Petitioner*,

v.

RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, and WHELAN DRUG CO., INC., a Florida corporation, *Respondents*

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's Brief in Opposition to the Petition for Writ of Certiorari herein suggests this Court should not take jurisdiction of the instant case under 28 U.S.C. 1257 (3). This reply is addressed solely to removing any doubt as to this Court's jurisdiction to review the

final judgment of the District Court of Appeal of Florida, Third District (hereinafter sometimes referred to as "appellate court"), entered on September 17, 1963. Said judgment was rendered by the highest court in the state of Florida capable of rendering a decision in the case at bar.

Respondent suggests that the question of Federal Constitutional protection for *Tropic of Cancer* and unconstitutional *application* of the Florida obscenity statute (F.S. 847.011) to that book, was not presented to, or passed upon by, the District Court of Appeal or the Supreme Court of Florida. In fact, however, Petitioner in its assignments of error and on brief and oral argument to the appellate court strongly urged the point (See Petitioner's Assignments of Error to the District Court of Appeal, grounds 4 and 5 set forth in Appendix A of this Brief; R. 286; Petition for Writ of Certiorari, pp. 7 and 8 and p. 2 at footnote 4. Hereafter said Petition is cited as "P."). The appellate court, after being ordered by the Supreme Court of Florida to do so (P. 8a), directly passed on the question: "The record discloses the chancellor approached the decision on a basis which was consistent with the standard previously announced by the Florida courts and with the tests set forth in the Roth and Day cases." (P. 3a). It is therein that the Florida courts erroneously and unconstitutionally *applied* the controlling law.

Petitioner did not submit the question to the Supreme Court of Florida, following the trial or appellate courts' decisions, because Petitioner had no right to review by the Supreme Court of Florida with respect to such question —under Article 5, section 4(2) of the Florida Constitution and Rules 2.1 (5) (a) and (b) of

the Florida Appellate Rules. Rule 2.1 (5) (b) defines the jurisdiction of the Florida Supreme Court over appeals from the District Courts of Appeal as follows:

> "(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon *the validity of a state statute*, a federal statute or treaty, *or initially construing a controlling provision of the Florida or federal Constitution.*" (Italics added) (See Appendix B of this Brief)

Respondent indirectly confirms the correctness of this proposition, and thus also of the non-reviewability of the District Court of Appeal's decision, when it points out with reference to Rule 2.1 (5) (a), which deals with appeals from trial court decisions, that the Florida Supreme Court has jurisdiction to hear appeals "directly passing upon the validity of a state statute, . . . or construing the controlling provision of the Florida or Federal Constitution" (Respondent's Brief in Opposition, p. 3; see Appendix B of this Brief). Since Petitioner's challenge of unconstitutionality was by waiver and stipulation limited to an erroneous *application* of the statute to the literary work in question, any appeal to the Florida Supreme Court would have been improper.

The appellate court was not asked to, nor did it pass on the *validity* of the Florida obscenity statute, as distinguished from its *application* to a particular literary work (*Tropic of Cancer*). Neither did that appellate court construe a controlling provision of the Florida Federal Constitution. As the appellate court itself said in its opinion ". . . the question of validity

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[1] The distinction in Florida law between the *validity* of a statute and its *application* is clear. To attack a statute's *validity* is to seek to expunge that statute from the records. How-

of the statute was waived and the decision found not to involve constitutional construction[2] . . ." (P. 3a).

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ever, to attack the *application* of a statute is to challenge the use of the statute only in a particular case with reference to the specific facts involved. The Supreme Court of Florida has stated as follows on this point:

> ". . . the decision that reached the District Court of Appeal was not one which would remove from the statute books or leave there the challenged law. The law would remain for application in all causes when that application would not, due to relevant circumstances, amount to transgression of constitutional guaranties. Had the Chancellor determined that the law itself was constitutional or unconstitutional irrespective of its application to pertinent facts the ruling would have been reviewable by direct appeal to the Supreme Court." *Stein* v. *Darby*, 134 So. 2d 232, 236, (Fla. 1961).

> "If the decree merely held the statute unconstitutional as applied to the appellees-plaintiffs under the facts of this case rather than invalid per se, then we do not have jurisdiction of this appeal." *Snedeker* v. *Vernmar Ltd.*, 139 So. 2d 682, 684 (Fla. 1962).

[2] The appellate court did not *construe* any provision of the U.S. or Florida Constitution, although the prevailing constitutional test, under "the *Roth* and *Day* cases" (*Roth* v. *United States*, 354 U.S. 476; *Manual Enterprises* v. *Day*, 370 U.S. 478), was applied through application of the Florida statute embodying that test to *Tropic of Cancer*. The Supreme Court of Florida has ruled on this point as follows:

> ". . . it is necessary that the final decree under assault actually construe, as distinguished from apply, a controlling provision of the constitution . . . We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient merely that the trial judge examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution". *Armstrong* v. *City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958); see also *Snedeker*, *supra*.

This did not, however, serve to deprive Petitioner of its challenge to the unconstitutional *application* of the Florida obscenity statute. (See Appendix A, ground 5; P. 2 at footnote 1)

On appeal from the trial court, the appellate court transferred the case to the Supreme Court of Florida ". . . to determine the question of its jurisdiction . . ." (P. 6a) The Supreme Court of Florida agreed with Petitioner's position that, the *validity* of the statute not being questioned, jurisdiction on appeal was properly in the appellate court, and ordered the cause "transferred back" to the appellate court "for consideration and determination". (P. 8a and 2 at footnote 1). The force of the Supreme Court of Florida's Order and its previously cited rulings are determinative of the jurisdictional question raised by Respondent.

Petitioner properly presented and asserted at trial and on appeal to the District Court of Appeal that *Tropic of Cancer* was not obscene and that the Florida obscenity statute was unconstitutionally *applied* to *Tropic of Cancer*, because that work *could not be held obscene* under the *Roth* tests incorporated by the Florida statute. This point was never withdrawn by Petitioner who waived only his charge that the Florida obscenity statute was unconstitutional on its face. (See P. 2 at footnote 1; P. 5a at footnotes 2 and 3.).

The appeal was properly considered by the District Court of Appeal and no appeal could properly lie, before or afterward, with the Supreme Court of Florida. No further review to any higher Florida court being possible,[3] the decision of the District Court

[3] Respondent does not question, and Petitioner wishes to state, that *certiorari* to the Florida Supreme Court also does not lie in such a case (Florida Appellate Rule 2.1(5)(b)) (See Appendix B).

of Appeal that *Tropic of Cancer* was obscene, *applying* the *Roth* test of obscenity, was the final judgment rendered by the highest court of the State of Florida in which a decision could be had. *Karlin* v. *City of Miami Beach*, 113 So. 2d 551 (Fla. 1959) and 28 U.S.C. 1257 (3).

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY—IN CHANCERY

No. 61C 11673

THE STATE OF FLORIDA, EX REL RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida, *Plaintiff*,

-vs-

WHELAN DRUG CO., INC., a Florida corporation, and GROVE PRESS, INC., a New York corporation, *Defendants*.

Assignments of Error

The Defendant, Grove Press, Inc., hereby assigns as error to be relied upon in this appeal to the District Court of Appeal for the Third District of Florida, the following:

1. The Court erred since the Final Decree of this Court is against the manifest weight of the evidence.

2. The Court erred since the Final Decree is contrary to law.

3. The Court failed to ascertain and determine that the Statute under which the action can be brought was unconstitutional and in violation of the 1st and 14th Amendments of the Constitution of the United States of America.

4. The Court erred in find that the book, "Tropic of Cancer", was obscene in violation of the Defendants' rights under the 1st and 14th Amendments of the Constitution of the United States of America.

5. The Court erred in unconstitutionally applying the definition of obscenity set forth in the Florida Statutes involved herein in violation of the defendants' rights guar-

anteed under the 1st and 14th Amendments to the Constitution of the United States of America.

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I Hereby Certify that a true copy hereof was mailed this 23d day of November, 1962 to Shapiro & Fried, Esqs., attorneys for Whelan Drug Co., Inc., 407 Lincoln Road, Miami Beach, Florida and to Richard E. Gerstein, Esq., State Attorney, Dade County Court House, Miami 32, Florida, attention: George Orr, Ass't. State Attorney.

TOBIAS SIMON

APPENDIX B

Florida Appellate Rules

Rule 2.1

(5) *Jurisdiction of the Supreme Court.*

(a) Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees passing directly upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal Constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The Supreme Court may directly review interlocutory orders or decrees passing upon chancery matters which upon final decree would be directly appealable to the Supreme Court. In all direct appeals and interlocutory appeals, the Supreme Court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from deci-

sions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law.

The Supreme Court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to trial courts when questions are involved upon which a direct appeal to the Supreme Court is allowed as a matter of right.